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EXPRO MARINE SDN BHD v. AMALGAMATED PLANT ENGINEERING SDN BHD

COURT OF APPEAL, PUTRAJAYA
NOR BEE ARIFFIN JCA
SUPANG LIAN JCA
B GHAZALI CHA JCA
[CRIMINAL APPEAL NO: Q-02(A)-26-01-2021]
29 OCTOBER 2021

C **Abstract** – *(i) A matter does not become academic when a party, having known of the injunctive reliefs sought by the other party towards the preservation of the status quo of the agreement that they had entered and the existence of an on-going arbitral proceeding, terminates the agreement to circumvent or defeat such injunctive reliefs sought; (ii) Although the undertaking to damages is an essential element to prove* D *the injunctive reliefs, the quantum and financial means are not cast in stone. Factors such as the nature of the company and the satisfaction of other requirements in proving the injunctive reliefs must be considered broadly and objectively.*

E ***CIVIL PROCEDURE:*** *Interim orders – Injunctive reliefs – Parties executed agreement for project – One party sought to terminate agreement upon discovery that other party ('applicant') signed contract with unknown third party for project – Applicant sought injunctive reliefs to preserve status quo of parties pending full and final conclusion of arbitration proceedings – Agreement terminated – Whether* F *status quo of parties ought to be preserved – Whether matter academic following termination of agreement – Whether applicant must show means to fulfil valuable undertaking notwithstanding satisfaction of all other requirements – Whether there were bona fide issues to be tried – Whether there was full and frank disclosure of facts – Whether award of damages adequate to compensate applicant if injunctive* G *reliefs not allowed – Whether balance of convenience tilted in applicant's favour – Arbitration Act 2005, s. 11(1)(a), (b) & (c)*

The appellant ('plaintiff') and the respondent ('defendant') had executed a master agreement concerning maintenance works for the Sabah-Sarawak Gas Pipeline ('project') by way of a letter of award. The defendant later H discovered that the plaintiff signed a contract with an unknown third party, for the project, without seeking the defendant's consent. Following this discovery, the defendant sought to terminate the master agreement. The plaintiff filed originating summons ('OS'), at the High Court, seeking interim injunctive reliefs to, *inter alia*, preserve the *status quo* of the parties pending I the full and final conclusion of the arbitration proceedings which the plaintiff

had commenced. The injunctive reliefs sought in the OS were orders: (i) restraining the defendant from terminating and/or attempting to terminate the master agreement ('prayer (a)'); (ii) restraining the defendant from replacing the plaintiff in the execution of the master agreement, executing the works for the project without the involvement and consent of the plaintiff and/or entering into any agreement with any third party; (iii) that the defendant disclose to the plaintiff the particulars of all contracts, agreements and/or consortiums entered into by the defendant with any third party other than the plaintiff in relation to the project and/or in relation to the financing of the project; (iv) that the plaintiff was expressly allowed to execute the works for the project, in accordance with the terms of the master agreement ('prayer (d)'); and (v) that nothing in the order shall prevent the defendant from its normal business and operational obligations under the letter of award and/or the master agreement. The defendant, on the other hand, issued a notice to terminate the master agreement on the ground that the plaintiff failed to remedy the breach. The High Court dismissed the plaintiff's OS, pursuant to s. 11(1)(a), (b) and (c) of the Arbitration Act 2005 ('Act'), on the grounds that (i) prayers (a) and (d) were rendered academic because of the issuance of the notice of termination by the defendant; and (ii) the plaintiff failed to provide valuable undertaking to pay damages. Hence the present appeal. The issues that arose for determination were (i) whether the HCJ erred in fact and/or in law in: (a) refusing to exercise the court's judicial power pursuant to s. 11(1)(a) of the Act to preserve the *status quo* of the parties; (b) holding that the injunctive reliefs sought by the plaintiff had been rendered academic; and (c) in holding that it was trite for the plaintiff to provide valuable undertaking to pay damages and the applicant must show that he had the means to fulfil such undertaking notwithstanding that all the other requirements were satisfied; (ii) whether there were *bona fide* issues to be tried; (iii) whether there was full and frank disclosure of facts by the plaintiff at the High Court; (iv) whether an award of damages adequate to compensate the plaintiff if the injunctive reliefs were not allowed; and (v) the balance of convenience.

Held (allowing appeal)
Per Ghazali Cha JCA delivering the judgment of the court:

(1) The OS was filed by the plaintiff, in September 2020, fearing the risk of being replaced by a third party. The main purpose of the OS was to preserve the *status quo* of the parties while having the matters resolved before an arbitral tribunal. Nevertheless, the defendant, having known of the OS and the on-going arbitral proceedings, proceeded to terminate the agreement in November 2020. This was clearly done in order to circumvent or defeat the plaintiff's OS. The OS, specifically prayers (a) and (d), were not rendered academic as the subject matter in dispute would be disputed and heard before the arbitral tribunal and, hence, it

would only be just to have the *status quo* of the parties preserved. The rights and interests of the plaintiff would be greatly affected if the OS was dismissed pending the disposal of the arbitral proceedings as the plaintiff would be replaced by another contractor by the defendant as the master agreement was terminated. There existed a real dispute of facts between the parties. The granting of the injunctive relief had a direct impact on the rights and interests of the parties under the master agreement. It was appropriate to have the *status quo* of the matters raised in prayers (a) and (d) maintained. (paras 30-32, 34, 35 & 39)

(2) Although the undertaking to damages is an essential element to prove the injunctive reliefs, the quantum and financial means are not cast in stone. Factors such as the nature of the company and the satisfaction of other requirements in proving the injunctive reliefs must be considered broadly and objectively. The plaintiff had given sufficient undertaking to the court. The plaintiff had a paid-up capital of RM750,000 and was a going concern. The company seemed to have a strong technical support team to conduct a mega project of this nature. There was no evidence that the plaintiff was insolvent or in the midst of being wound up and in huge debt or was unable to satisfy its debt, if any. The HCJ erred in law and fact in imposing an onerous obligation on the plaintiff to adduce 'sufficient' undertaking to damages to be entitled to the injunctive relief while keeping silent as to what was 'sufficient' undertaking to damages. (paras 55, 57, 58 & 60)

(3) There were *bona fide* issues to be tried and they ought to be fully-ventilated before the arbitral tribunal; not at the High Court. (para 65)

(4) The plaintiff had not suppressed any material facts from the High Court. The defendant had not highlighted any pertinent facts allegedly suppressed by the plaintiff. To the contrary, all documents and correspondences had been exchanged through affidavits. Therefore, the plaintiff met the requirement of making a full and frank disclosure to the court. (paras 70 & 71)

(5) Damages were not adequate to compensate the plaintiff if the injunctive relief was not allowed. The matter at hand was more than just a breach of the master agreement or its termination. It involved multiple parties and issues unravelled from the arrangement and discussion of these multiple parties. It would be absurd to decide that the award of damages was adequate to compensate the plaintiff while there could be other adverse consequences affecting both parties, such as injury to reputation and goodwill. (para 77)

(6) The balance of convenience tilted in the plaintiff's favour. The plaintiff would suffer grave injustice if the injunctive reliefs sought were not allowed. The *status quo* ought to be preserved. (para 83)

Case(s) referred to:
Allen v. Jambo Holdings Ltd [1980] 2 All ER 502 ***(refd)***
Anil Kumar Chigurupati v. Paramanand Kanayalal & Ors [2018] 1 LNS 751 HC ***(refd)***
Chow Yee Wah & Anor v. Choo Ah Pat [1978] 1 LNS 32 PC ***(refd)***
Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor [2020] 3 CLJ 593 FC ***(refd)***
Garden Cottage Foods Ltd v. Milk Marketing Board [1983] 2 All ER 770 ***(refd)***
Ho Num Chon & Anor v. Tech-Lab Scientific Sdn Bhd & Ors [2016] 1 LNS 686 HC ***(refd)***
KNM Process Systems Sdn Bhd v. Lukoil Uzbekistan Operating Company LLC [2020] 1 LNS 479 CA ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Lim Kit Siang v. United Engineers (M) Bhd & Ors [1987] 2 CLJ 233; [1987] CLJ (Rep) 742 HC ***(refd)***
Ling Ngong Hiang v. Golden Palm Grower Bhd; Suruhanjaya Syarikat Malaysia (Intervener) & Another Case [2019] 1 LNS 2151 HC ***(refd)***
Multazam Development Sdn Bhd v. Felda Global Ventures Plantations (M) Sdn Bhd [2019] 1 LNS 335 HC ***(refd)***
Sigur Ros Sdn Bhd & Anor v. Maybank Islamic Bhd & Anor [2018] 1 LNS 220 HC ***(refd)***
Tan Bun Teet & Ors v. Menteri Sains, Teknologi Dan Inovasi Malaysia & Ors [2013] 3 CLJ 1115 CA ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1993] 2 CLJ 146 SC ***(refd)***
Third Chandris Shipping Corporation & Ors v. Unimarine Sa; The Pythia, The Angelic Wings, The Genie [1972] 2 All ER 972 ***(refd)***
WRP Asia Pacific Sdn Bhd & Anor v. Tael Tijari Partners Ltd & Ors [2019] 1 LNS 1645 HC ***(refd)***

Legislation referred to:
Arbitration Act 2005, s. 11(1)(a), (b), (c)
Rules of Court 2012, O. 29 r. 1(2)

For the appellant - Lo Mei Chin; M/s Lo & Partners
For the respondent - Shankar R P Asnani, Russell Lim & Yu Ying Ying; M/s Thomas, Shankar Ram & Co Advocs

[Editor's note: For the High Court judgment, please see Expro Marine Sdn Bhd v. Amalgamated Plant Engineering Sdn Bhd [2020] 1 LNS 2266 (overruled).]

Reported by Najib Tamby

JUDGMENT

Ghazali Cha JCA:

[1] This is the appeal against the High Court decision in dismissing the appellant's application for interim injunctive reliefs pursuant to s. 11 of the Arbitration Act 2005 ("AA 2005").

[2] For ease of reference, parties are referred as they were in the High Court.

[3] Upon perusing the parties' respective written submissions, executive submission and oral submission *via* online hearing, it was our unanimous decision that there are merits in the appeal and we thereby allowed the appeal with costs.

[4] Below are our grounds of decision.

Background Common Facts

[5] The dispute between parties arose from a master agreement executed by the plaintiff and defendant concerning the maintenance works of the Sabah-Sarawak Gas Pipeline (interchangeably referred to as the "SSGP project" or "the said project") under the tender no. DTC-BTU/PBF/2019/32 ("the letter of award").

[6] Sometime in July 2020, the defendant found out that the plaintiff had signed a contract with unknown third party for the said project without seeking consent from the defendant. A letter dated 24 July 2020 was issued to the plaintiff indicating the defendant's intention to terminate the master agreement.

[7] The plaintiff, acting on its solicitor's advice had filed an originating summons on 30 September 2020 in the court seeking interim injunctive reliefs to, *inter alia*, restore the *status quo* of the parties. In the meantime, the plaintiff also commenced the arbitration proceeding on 8 October 2020 pursuant to cl. 7 of the master agreement.

[8] On 11 November 2020, the defendant had issued a termination letter terminating the master agreement on the ground that the plaintiff had failed to remedy the breach.

The Originating Summons ("OS")

[9] This brings us to a discussion of the injunctive reliefs sought by the plaintiff in the High Court.

[10] In the OS, the plaintiff sought for the following reliefs:

(a) An order restraining the defendant, whether by itself or through its directors, employees, servants, representatives and/or agents or otherwise howsoever, from terminating and/or attempting to terminate the master agreement dated 23 September 2019 made between the plaintiff and the defendant ("master agreement") in relation to the maintenance of mechanical pipelines known as the Sabah-Sarawak Gas Pipeline or in SSGP ("the project") pending the full and final conclusion of the arbitration proceedings.

(b) An order restraining the defendant, whether by itself or through its directors, employees, servants, representatives and/or agents or otherwise howsoever, from replacing the plaintiff in the execution of the works for the project contrary to the master agreement and/or executing the works for the project without the involvement and consent of the plaintiff and/or entering into any agreement with any third party for the execution of the works for the project contrary to the master agreement pending the full and final conclusion of the arbitration proceedings full and final conclusion of the arbitration proceedings.

(c) An order that the defendant, whether acting by itself or by its directors, employees, servants, representatives and/or agents or otherwise by any way whatsoever, within seven days from the service of this order, disclose to the plaintiff by way of sworn affidavit the particulars of all contracts and/or agreements and/or consortiums, written or otherwise, entered into by the defendant with any third party other than the plaintiff in relation to the project and/or in relation to the financing of the project.

(d) An order that the plaintiff is expressly allowed to execute the works for the project in accordance with the terms of the master agreement pending the full and final conclusion of the arbitration proceedings.

(e) Nothing in this order shall prevent the defendant from its normal business and operational obligations under the letter of award and/or the master agreement.

[11] In a nutshell, the plaintiff filed the OS in order to preserve the *status quo* of the parties until the resolution of the arbitral proceeding.

The High Court Decision

[12] The High Court, after hearing both parties, dismissed the plaintiff's OS pursuant to s. 11(1)(a), (b) and (c) of the AA 2005.

[13] In essence, prayers (a) and (d) were not allowed because the learned High Court Judge found that they are rendered academic whereas prayers (b) and (c) were refused as the plaintiff had failed to provide valuable undertaking to pay damages. No credible evidence was adduced to prove that the plaintiff has the means to fulfil the said undertaking when challenged. In short, bare undertaking would not succeed.

[14] Being dissatisfied with the High Court's decision, the plaintiff had filed a notice of appeal dated 23 December 2020 against specific parts of the High Court decision.

[15] The plaintiff's main grounds of appeal before this court are:

(i) the injunctive reliefs for the *status quo* of the parties to remain is not academic; and

A (ii) the undertaking given by the managing director's affidavit is sufficient, valid and satisfactory in law.

Grounds Of Appeal/Issues To Be Determined

[16] Based on the memorandum of appeal, the plaintiff's grounds of appeal B may be summarised as follows:

(i) the learned High Court Judge has erred in fact and/or in law in refusing to exercise the court's judicial power pursuant to s. 11(1)(a) of the AA 2005 to preserve the *status quo* of the parties;

C (ii) the learned High Court Judge erred in fact and/or law in holding that the injunctive reliefs sought by the plaintiff have been rendered academic; and

(iii) the learned High Court Judge has erred in fact and/law in holding that it is trite law for the applicant to provide valuable undertaking to pay D damages and the applicant must show that he has the means to fulfil such undertaking notwithstanding that all the other requirements are satisfied.

[17] The other issues to be determined are:

(i) *bona fide* issues to be tried;

E (ii) full and frank disclosure;

(iii) whether damages is adequate to compensate; and

(iv) the balance of convenience.

Whether The Relief Sought By The Plaintiff In The OS Has Been Rendered F *Academic*

[18] It is the defendant's submission in the High Court that the OS is rendered academic as the master agreement was legally terminated in view that the plaintiff had failed to apply for an *ex parte* interim injunction prior to the OS as provided under O. 29 r. 1(2) of the Rules of Court 2012 G ("ROC").

[19] In this respect, the learned High Court Judge had this to say:

> [43] It is my considered view that the plaintiff request for an "*ex parte* court hearing for oral submission" or "an *ex parte* date for parties to file and H exchage submission" and further "an *ex parte* date for ruling of this action" for matters related to injunctive reliefs after the Originating Summons was served to the defendant could not be entertained by this Court for non-compliance to Order 29 rule 1 of the Rules of Court 2012. It is not the correct approach to request for an *ex parte* hearing specifically on injunction matters merely by issuing a certificate of urgency.
>
> I [44] It is my considered view that without any *ex parte* interim injunction for the prayers sought in Originating Summons, there is no legal restriction and/or prohibition for the defendant to issue the Notice of Termination on 11.11.2020.

...

[50] With respect, I am unable to accept the submission by the plaintiff for this court to exercise discretion to restore the *status quo* of the case to such effect as if the Letter of Termination had never been issued by the plaintiff before the hearing of the Arbitration Proceeding.

[51] It is my considered decision that the plaintiff has the legal avenue to apply for an *ex-parte* interim injunction pursuant to Order 29 Rule 1(2) of Court 2012 to prevent the defendant from issuing the letter of termination. However, this was not done.

[52] Alternatively, the plaintiff's counsel further submits that even if this Court may find that prayer (1) of the Originating Summons is academic, it does not render the entire application of the plaintiff academic.

...

[54] In regards to prayer (4), it is my considered that this court should not allow the prayer for plaintiff to be allowed to execute the works for project in accordance with the terms of the master agreement pending the full and final conclusion of the arbitration proceedings as the master agreement had already been terminated by the defendant since 11.11.2020.

[55] That upon considering the facts and law as submitted by both counsel for the parties, it is my considered decision that prayers (1) and (4) of the Originating Summons is academic and/or redundant as the master agreement had been terminated by the defendant on 11.11.2020.

[56] In regards to prayers Nos. (2) and (3), upon perusal of the nature of these prayers and upon considering the submission made by the parties thereof, it is my considered decision that prayers Nos. (2) and (3) are independent from prayer (1) and therefore do not become academic/ redundant by the issuance of the Letter of Termination by the defendant.

[20] In short, the learned High Court Judge accepted the defendant's position that the proper recourse for the plaintiff was to file an *ex parte* interim injunction pursuant to O. 29 r. 1 of the ROC. As the plaintiff had not done so, the OS must fail.

[21] In determining whether the reliefs sought are academic, it is necessary to look at the chronology of events.

[22] Sometime in July 2020, the plaintiff received a notice of intention to terminate the master agreement from the defendant.

[23] Around September 2020, fearing the risk of being terminated, the plaintiff filed the OS for injunctive relief to preserve the *status quo* of the parties in the agreement, *inter alia*, to prevent the defendant from replacing the plaintiff in the contract.

[24] On 11 November 2020, the plaintiff terminated the master agreement.

[25] The defendant, on the other hand, submitted that the OS is academic and redundant as the subject matter being the master agreement has already been terminated.

[26] The defendant referred this court to the case of *Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor* [2020] 3 CLJ 593; [2020] 4 MLJ 133 where the apex court held that:

> **In contrast, a matter is not abstract, academic or hypothetical if the parties' rights and interests are actually affected**. (emphasis added)

[27] Further, the defendant relied on a passage from *Garden Cottage Foods Ltd v. Milk Marketing Board* [1983] 2 All ER 770, which is as follows:

> *For the purpose of deciding whether an interlocutory injunction should be granted to preserve the status quo, the status quo is the state of affairs existing during the period immediately preceding the issue of the writ seeking permanent injunction or, if there is unreasonably delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion.* (emphasis added)

[28] Thus, the question for determination is whether the subject matter, ie, the master agreement is no longer in existence.

Our Decision

[29] Having considered the facts and the authorities highlighted to us attention, we are unable to agree with the defendant's submission and the decision of the High Court.

[30] We shall firstly address if O. 29 r. 1 of the ROC is the proper recourse for the plaintiff must resort to. We agree with the learned High Court Judge that O. 29 r. 1 of the ROC is avenue to the plaintiff but this is not the only avenue or the reason that fail the OS. It must be remembered that in September 2020, the OS was filed by the plaintiff fearing the risk of being replaced by a third party. The main purpose of the OS is to preserve the *status quo* of the parties while having matters resolved before the arbitral tribunal.

[31] Nevertheless, on 11 November 2020, having known of the OS and the ongoing arbitral proceeding, the defendant proceeded to terminate the agreement. This, with respect, was clearly done in order to circumvent or defeat the plaintiff's OS.

[32] We are unable to agree with the learned High Court Judge and the defendant that the OS, specifically prayers (a) and (d) were rendered academic as the subject matter in dispute would be disputed and heard before the arbitral tribunal and hence, it would only be just to have the *status quo* of the parties preserved.

[33] It must also be remembered that in *Datuk Seri Anwar Ibrahim* (*supra*), to determine if a matter is rendered academic or not, the test is whether there is an actual controversy affecting the rights and interest of the parties.

[34] In the present case, the answer is positive. The rights and interests of the plaintiff clearly would be greatly affected if the OS is dismissed pending the disposal of the arbitral proceeding. The plaintiff would be replaced by another contractor by the defendant as the master agreement is terminated.

[35] Accordingly, we are of the considered view that there exists a real dispute of facts between the parties. The granting of the injunctive relief has a direct impact of the rights and interests on the parties under the master agreement.

[36] The defendant also made reference to the cases of *Ling Ngong Hiang v. Golden Palm Grower Bhd; Suruhanjaya Syarikat Malaysia (Intervener) & Another Case* [2019] 1 LNS 2151; *Ho Num Chon & Anor v. Tech-Lab Scientific Sdn Bhd & Ors* [2016] 1 LNS 686; and *Anil Kumar Chigurupati v. Paramanand Kanayalal & Ors* [2018] 1 LNS 751 where the issue of whether a matter is rendered academic when the subject matter is no longer in dispute, has been considered.

[37] For instance, in *Ling Ngong Hiang* (*supra*), the plaintiff sought to declare certain proposed resolutions at an extraordinary general meeting to be invalid, null and void and for an injunction against the defendant from acting on the proposed resolution if passed. The High Court did not allow the injunctive relief and held as follows:

> *[6] The reliefs in prayer 1, 2,3 and 8 have been rendered academic by the time of the hearing of OS 202 as the Proposed Resolutions were rejected at the 22.4.2019 EGM.*
>
> *...*
>
> *[25] At the requisitioned meeting of the Growers on 22.4.2019, Resolution 1 was not passed and as such, Resolutions 2 and 3 became academic. It is for these reasons that the injunctive 1 declaratory reliefs sought in prayers (1) to (3) and (8) of the OS which related to these Resolutions are now rendered academic.*
>
> (emphasis added)

[38] With respect we do not agree with counsel for the defendant that the propositions in the above cases are applicable in the instant appeal. Reason being that the subject matter in dispute, ie, the master agreement is being disputed in the arbitration proceeding. We must not only look at the termination letter in isolation but must also consider the entire context of the master agreement, the validity of the termination, the *bona fide* issues to be tried and the arbitration proceeding.

[39] The subject matter is not entirely disposed of by an alleged termination letter. The controversy affecting the parties' right is still in existence for the arbitrator to decide. Accordingly, it is our considered view that it is only appropriate to have the *status quo* of the matters raised in prayers (a) and (d) to be maintained.

[40] As rightly pointed out by the plaintiff's counsel, the plaintiff in the arbitration proceedings is seeking declaratory relief for breach of contract in that it is asserted that the termination of the master agreement was not lawful. This would mean that the injunctive relief, if granted, would not be rendered academic.

[41] In addition, we agree with the plaintiff's submission that the granting of the injunctive reliefs falls squarely within the ambit of s. 11(1) of the AA 2005.

[42] Section 11(1) of the AA 2005 confers discretion to the judge in granting the interim relief to the party pending the hearing or disposal of the arbitral proceeding: see which was followed by *KNM Process Systems Sdn Bhd v. Lukoil Uzbekistan Operating Company LLC* [2020] 1 LNS 479; [2020] MLJU 85.

[43] However, we do not intend to delve into the elements of s. 11 of the AA 2005 as the jurisdiction of the High Court in granting the interim measures pending the disposal of the arbitral proceeding is not a matter in dispute in the present case.

[44] Whilst we agree with the learned High Court Judge that prayers (b) and (c) would not be rendered academic if the injunctive reliefs are allowed, we cannot agree that prayers (a) and (d) are rendered redundant for reasons stated above. For completeness, a cursory reading of the prayers show that the injunctive reliefs sought are factually inter-related. Hence, with respect, we are of the considered view that the learned High Court Judge had erred in law and fact in deciding that the injunctive reliefs (a) and (d) were rendered redundant. There is serious controversy affecting the rights and interest of the parties, particularly the plaintiff in the present case. Whilst the matter is pending disposal in the arbitral proceeding, it is only right and just to allow the plaintiff's application to preserve the *status quo* of the parties under the master agreement.

Whether The Undertaking Given By The Plaintiff As To Damages Is Sufficient

[45] One of the requirements for an injunctive relief to be allowed is for an applicant to provide undertaking to damages.

[46] In the High Court, the defendant has contended that the plaintiff has failed to provide valuable undertaking to damages to the court and a bare undertaking by the plaintiff's director in his affidavit will not suffice in the eyes of the law.

[47] The defendant submitted that the plaintiff's company only has the paid-up capital of RM750,000 which is less than the contract price of the agreement.

[48] The defendant relied on a plethora of cases of *Third Chandris Shipping Corporation & Ors v. Unimarine Sa; The Pythia, The Angelic Wings, The Genie* [1972] 2 All ER 972; *Lim Kit Siang v. United Engineers (M) Bhd & Ors* [1987]

2 CLJ 233; [1987] CLJ (Rep) 742; [1988] 1 MLJ 35; and *Tan Bun Teet & Ors v. Menteri Sains, Teknologi Dan Inovasi Malaysia & Ors* [2013] 3 CLJ 1115; [2013] 3 MLJ 676 to support its position.

[49] In *Third Chandris Shipping Corporation & Ors* (*supra*), the Court of Appeal held that:

> *... the plaintiffs must, of course, give an undertaking in damages, in cases they fail in their claim or the injunction turns out to be unjustified. In a suitable case this should be supported by a bond or security; and the injunction only granted on it being given, or undertaken to be given.* (emphasis added)

[50] In *Lim Kit Siang* (*supra*), it was held that:

> *... It is trite law that if the plaintiff is not in a financial position to honour his undertaking as to damages, and appreciable damage to the defendant is likely, an injunction must be refused: Morning Star Co-Operative Ltd v. Express Newspapers Ltd [1979] FSR 113 ...* (emphasis added)

See also *Sigur Ros Sdn Bhd & Anor v. Maybank Islamic Bhd & Anor* [2018] 1 LNS 220; [2018] MLJU 244.

[51] In this regard the learned High Court Judge said:

> [66] Based on the above case authorities, it is trite law that an applicant for interlocutory injunction must provide valuable undertaking to pay damages. Further the applicant must show that he has means to fulfil such undertaking.
>
> [67] In our instant case, despite being challenged by the defendant on the plaintiff's bare undertaking, the plaintiff had refused and/or failed to show that it has the means to fulfil such undertaking.
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> [68] It is further noted that the deposition made in paragraph 76 of the affidavit in reply encl. 16 on the paid-up capital of the plaintiff amounting to RM750,000.00 is not being supported by any documentary evidence by the plaintiff.
>
> [69] That upon considering the facts and relevant laws on "undertaking as to damages" in an application for injunctive reliefs, it is my considered decision that the failure of the plaintiff to provide valuable undertaking to pay damages and further show that the plaintiff has means to fulfil the said undertaking when challenged by the defendant is fatal to the plaintiff's application for injunctive relief in this action.
>
> [70] That upon considering the facts and law as submitted by both counsel for the parties, it is my considered view as follows:
>
> (a) That prayers (1) and (4) of the Originating Summons is academic and/or redundant as the master agreement had been terminated by the Respondent on 11.11.2020.
>
> (b) The failure of the plaintiff to provide valuable undertaking to pay damages and further show that the plaintiff has means to fulfil the said undertaking despite being challenged by the Respondent on such matter is fatal to the Appellant's application injunctive reliefs in this action.

[52] The plaintiff submitted that it is never trite law and mandatory requirement to require "an applicant for interlocutory injunction to provide valuable undertaking to pay damages or to show that he has means to fulfil such undertaking".

[53] The plaintiff relied on *Allen v. Jambo Holdings Ltd* [1980] 2 All ER 502 which decided that an undertaking is required for every single interlocutory injunction application, regardless of the applicant's financial standing. A poor applicant must give an undertaking although the undertaking given amounts to an empty shell and when such undertaking is given, the strict requirement is fulfilled.

[54] In the case above Lord Denning stated as follows:

> *There is one other point that I must mention. It is said whenever a Mareva injunction is granted the plaintiff has to give the cross-undertaking in damages. Suppose the widow should lose her case altogether. She is legally aided. Her undertaking is worth nothing. I would not assent to that argument. As Shaw LJ said in the course of the argument, a legally aided plaintiff is by our statutes not to be in any worse position by reason of being legally aided than any other plaintiff would be. I do not see why a poor plaintiff should be denied a Mareva injunction just because he is poor, whereas a rich plaintiff would get it. One has to look at this matter broadly. As a matter of convenience, balancing one side against the other, it seems to me that an injunction should go to restrain the removal of this aircraft.* (emphasis added)

[55] Having considered the submissions of both parties, we agree with the plaintiff that it has given sufficient undertaking to the court.

[56] Firstly, we must look at the plaintiff company. Whilst the defendant complained that the plaintiff company has failed to prove any means to fulfil the undertaking to damages to the court, we must ask ourselves a pertinent question: how much is considered sufficient or adequate?

[57] The plaintiff company has a paid-up capital of RM750,000 and is a going concern. The company seems to have strong technical support team to conduct a mega project of this nature. There is not a single shred of evidence in that the company is insolvent or in the midst of being wound up. There is also no evidence to prove that the company has a huge debt or is unable to satisfy its debt, if any.

[58] It is our considered view that the learned High Court Judge has erred in law and fact in imposing an onerous obligation on the plaintiff to adduce "sufficient" undertaking to damages to be entitled to the injunctive relief while keeping silent as to what is "sufficient" undertaking to damages as submitted by the defendant.

[59] Besides, in construction projects of the likes of this, it often involves lucrative consideration awarded to the parties. If the court is to be so fixated with the strong financial means of an applicant, we believe that injunctive relief would be near impossible.

[60] Hence, although we agree that the undertaking to damages is an essential element to prove the injunctive relief the quantum and the financial means are not cast in stone. Factors such as the nature of the company and the satisfaction of other requirements in proving injunctive relief must be considered broadly and objectively.

[61] To our minds, if the court is not satisfied with the undertaking to damages, the court can impose an amount that is considered satisfactory. It is only if the plaintiff fails to satisfy the amount set by the court that the plaintiff can be said to have failed to satisfy the undertaking on damages.

Other Issues

[62] For the reasons stated above, we are satisfied that the plaintiff has proved the merits in its appeal. Nevertheless, for the sake of completeness, we will discuss the other issues raised.

Bona fide Issues To Be Tried

[63] The defendant submitted that the learned High Court Judge has erred in fact and law in holding that there are *bona fide* issues to be tried.

[64] Paragraphs 17 and 18 of the High Court grounds of judgment read as follows:

> [17] I am satisfied that there are *bona fide* serious issues to be tried in the arbitration proceedings on which, *inter-alia*, are as follows:
>
> (a) Whether the successful bid of the project was to the plaintiff's technical expertise in the industry and the plaintiff's substantive involvement in the preparation of the bid proposal?
>
> (b) Whether the master agreement expressly authorises the plaintiff to enter into contractual relations with 3rd parties to execute the plaintiffs duties and obligations under the master agreement?
>
> (c) Whether the plaintiff needs to obtain the prior written consent of the defendant before entering into contractual relations with 3rd Parties?
>
> (d) Whether the defendant is entitled to unilaterally terminate the master agreement?
>
> (e) Whether the dispute between the parties should be resolved before the arbitral tribunal; and if so, whether the defendant is entitled to unilaterally terminate the master agreement before referring the dispute to arbitration?
>
> (f) Whether plaintiff had adhered to Clause 7 of the master agreement when referring the to the matter arbitral tribunal?
>
> (g) Whether the defendant failed to adhere to Clause 7 of the master agreement when the defendant had unilaterally terminated the master agreement?
>
> (h) Whether the defendant had falsely misrepresented to PETRONAS that the plaintiff is still involved in the works of the project?

(i) Whether the defendant's actions had damaged the plaintiff's reputation?

(j) Whether the possible damages to the plaintiff would be impossible to be quantified as the awarded by PETRONAS are on a "call-off" basis?

[18] The above issues are not for this Court to determine but instead by the arbitrator in the Arbitration Proceedings. As stated in *Capping Corporation Limited & Ors v. Aquawalk Sdn Bhd & Ors* (*supra*), this Court ought to take a minimal interference approach on the disputed facts which are to be determined by an arbitrator in the arbitration proceeding pursuant to the Arbitration Act 2005.

[65] On the facts raised by the parties and the issues identified by the learned High Court Judge, we are satisfied that the learned High Court Judge had correctly found that there are *bona fide* issues to be tried. We agree that the *bona fide* issues ought to be fully ventilated before the arbitral tribunal and not in the High Court.

Full And Frank Disclosure

[66] The defendant contended that the plaintiff had not made full and frank disclosure of the facts to the High Court.

[67] It was held in *WRP Asia Pacific Sdn Bhd & Anor v. Tael Tijan Partners Ltd & Ors* [2019] 1 LNS 1645;

[107] I find that there was suppression of material facts by the plaintiff at the time of the injunction orders.

...

[110] The aforesaid non-disclosure and or suppression of material facts in my mind justify the setting aside of the injunction orders ...

(emphasis added)

[68] We agree with the defendant that the plaintiff must make full and drank disclosure of the facts to the court in order to obtain the injunctive relief.

[69] In this regard, the High Court Judge, upon evaluation of the evidence held as follows:

[19] On this issue, it must be noted that the hearing of the Originating Summons was made *inter parte* whereby through the process of exchange of affidavits, the plaintiff had in fact made full and frank disclosure of all relevant facts related to the disputes between the parties. There is therefore no prejudice caused to the defendant as all the necessary information and documents were made available by the plaintiff to the defendant through the process of exchange of affidavits and therefore such argument raised defendant is without any merits (see *Damayanti Kantilal Doshi & Anor v. Jigarlal Kantilal Doshi* [2004] 1 MLJ 456 and *Dato' Sri Andrew Kam Tai Yeow v. Tan Sri Date' Kam Woon Wah & Ors* [2018] MLJU 1883).

[70] Thus, we are not persuaded by the defendant's submission that the plaintiff had suppressed any material facts from the High Court. Moreover, the defendant has not highlighted any pertinent facts suppressed by the plaintiff. To the contrary, the learned High Court Judge found that all documents and correspondences had been exchanged through the affidavits.

[71] In the premises, we are satisfied that the plaintiff has met this requirement of making full and frank disclosure to the court.

Whether An Award Of Damages Is Adequate To Compensate The Appellant If The Injunctive Reliefs Are Not Allowed

[72] It is well-settled that injunctive relief ought not to be granted if damages would be an adequate remedy.

[73] In *Multazam Development Sdn Bhd v. Felda Global Ventures Plantations (M) Sdn Bhd* [2019] 1 LNS 335; [2019] MLJU 365, it was held that damages arising from breach of contract can always be assessed for losses and damages suffered.

[74] Accordingly, the defendant said the injunctive reliefs ought not to be granted as damages arising from breach of contract through the alleged wrongful termination of the master agreement can be ascertained from an assessment of damages proceeding.

[75] The plaintiff on the other hand submitted that damages are not an adequate remedy. The consequential damage is not confined to monetary damages arising from the breach of contract but there are other potential adverse consequences to the plaintiff if injunctive relief is not granted.

[76] Regarding this point, the High Court in paras. 23 and 24 of its grounds of judgment held:

> [23] That upon taking into consideration of all the circumstances of the case and authorities cited by counsels on this issue, it is my considered view that the award of damages itself is not adequate to compensate the plaintiff if the injunctive reliefs are not allowed as the plaintiff's entitlement to the damages flowing from the breach of contract committed by the defendant is only one aspect of the consequence.
>
> [24] I do accept the plaintiff's submission that there are other possible/ potential adverse consequences that are likely to incur if the injunctive reliefs are not allowed. It is noted that is a possibility that Petronas Carigali Sdn Bhd may terminate the award for the project due to delay in executing the works thereby causing both plaintiff and defendant losing the contract forever and in such a situation, damages cannot be adequate remedy to the plaintiff.

[77] We agree with the learned High Court Judge that damages are not adequate to compensate the plaintiff if the injunctive relief is not allowed. Based on the background factual matrix and the issues raised, the matter at

A hand is more than just a breach of the master agreement or its termination. It involves multiple parties and issues unravelled from the arrangement and discussion of the multiple parties. It would be absurd to decide that the award of damages is adequate the compensate the plaintiff while there could be other adverse consequences affecting both parties, such as injury to
B reputation and goodwill.

Balance Of Convenience

[78] This brings us to the final issue raised, which is the for the test for balance of convenience.

C **[79]** The defendant's counsel contended that the learned High Court Judge had failed to consider that the alleged impact and/or substantial injustice that may be caused to the plaintiff is predicated on the following grounds:

(i) following the termination of the master agreement, the OS has been rendered academic;

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(ii) the termination of the master agreement arose from the plaintiff's own conduct in sub-contracting the SSGP project without prior approval of the defendant;

(iii) the plaintiff did not dispute the memorandum of agreement with third
E party;

(iv) that there has been clear failure on the part of the plaintiff to make full and frank disclosure; there is suppression of material facts/information by the plaintiff which should not be condoned by the court;

F (v) any loss and/or damage suffered by the plaintiff is confined and limited to what the plaintiff is entitled to in accordance with the master agreement;

(vi) the undertaking as to damages is a bare undertaking; and

(vii) the plaintiff has not come with clean hands.

G

[80] In respect of this issue, the learned High Court Judge held as follows:

> [27] That upon taking into account of the above-matters and the authorities cited by both parties, I am of the considered view that the balance of the balance of convenience is in the plaintiff's favour as in the
H event the injunctive reliefs are refused, substantial injustice would be incurred by the plaintiff as demonstrated by the plaintiff in the table above.

[81] The plaintiff in the submission before the High Court had produced a comparison table to highlight the situations in the event the injunctive relief
I is allowed and/or refused.

[82] For better understanding, we reproduce the comparison chart below:

PLAINTIFF	APPLICATION IS ALLOWED	APPLICATION IS REFUSED
	(a) PMT, all other sub-contractors and their respective employees get to go back to work;	(a) The livelihood of PMT, all other sub-contractors and their respective employees will directed be affected;
	(b) The livelihood of PMT, all other sub-contractors and their respective employees WILL NOT be affected, particularly during this pandemic season, if they all are able to stick to the current job under the project SSGP, their livelihood will be secured;	(b) The plaintiff might face financial difficulty and compelled to dismiss their employees;
	(c) The plaintiff will be able to continue performing the portfolio that has been assigned to them under the master agreement to the satisfaction of Petronas Carigali Sdn Bhd for the interest of the operation of the SSGP project;	(c) Resulting from the dismissal of their employees, industrial disputes might arise;
	(d) The plaintiff will be receiving the Profits by executing the Work Orders granted by Petronas Carigali Sdn Bhd;	(d) The plaintiff might not be remaining liquidated;
	(e) The award of the maintenance work of project SSGP will remain intact, valid, and enforceable. There is no risk that Petronas Carigali Sdn Bhd will terminate the award on the ground of delay of the execution of the contracted works due to the disputes between plaintiff and the defendant;	(e) If the plaintiff becomes unliquidated, the plaintiffs longstanding reputation in the industry will be tarnished;
		(f) The progress of the maintenance works for project SSGP will be curtailed; (g) The plaintiff will directly suffer from great losses if Petronas Carigali Sdn Bhd decides to terminate the award granted to the defendant due to the delay caused by the dispute between the plaintiff and the defendant;

DEFENDANT	APPLICATION IS ALLOWED (a) No damages/losses whatsoever	APPLICATION IS REFUSED (a) The progress of the maintenance project of SSGP will be entirely paused and causing substantial delay (if the defendant does not engage any other parties to carry out the works);
		(b) Even if the defendant engages other parties to carry out the works, the defendant will incur extra cost to start working with other parties. Forming a core team to carry out the works under the contract is not a task can be completed easily. From bidding for the project till the beginning of the execution of the works, it took more than half a year of the plaintiff and defendant;
		(c) Resulting from the possible delay, Petronas Carigali Sdn Bhd might exercise their right to terminate the award;
		(d) When the works are delayed and/or the award is terminated, it cannot be denied that it will result in the loss of profit of the defendant.

[83] Based on the above, we agree with the learned High Court Judge that the balance of convenience lies in favour of the plaintiff. This is because in the event the injunctive relief is not allowed, the plaintiff would suffer grave injustice and accordingly. The *status quo* ought to be preserved.

The Law On Appeal

[84] We are well aware of the role of the appellate court in hearing the appeal. The guiding principle is expounded in a plethora of cases such as *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; [1978] 2 MLJ 41b; *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1993] 2 CLJ 146; [1993] 1 MLJ 113; and *Lee Ing Chin Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 which held that the appellate court must be slow to intervene unless the court of first instance is shown to be plainly wrong in arriving at its decision or where there has been no or insufficient judicial appreciation of the evidence.

Conclusion

[85] For the reasons stated above, we are of the view that the appellant has fulfilled the pre-requisites necessary to granting of the injunctive reliefs pursuant to s. 11 of the AA 2005. The learned High Court Judge in our view has erred in his finding that a failure to provide valuable undertaking is fatal to the appellant's application for injunctive relief. The reliefs sought by the appellant should not have been deemed academic because of the issuance of the notice of termination. Accordingly, we allowed the appeal with costs of RM10,000 subject to allocator.